Supreme Court, U.S.
FILED
MAY 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF YONKERS, *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONERS

STANLEY R. STRAUSS
MICHAEL W. SCULNICK
VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
One Dag Hammarskjold Plaza
New York, New York 10017
(212) 223-1880

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-1000

PAUL W. PICKELLE
JOSEPH E. ST. ONGE
Corporation Counsel
City of Yonkers
Yonkers City Hall
Yonkers, New York 10701
(914) 964-3205

Counsel for Petitioners

* Counsel of Record

May 27, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases Page

Liddell v. *State of Missouri*, 731 F.2d 1294, *cert. denied*, 469 U.S. 816 (1984) 4
Mayor v. *Educational Equality League*, 415 U.S. 605 (1974) 3, 4
Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 (1979) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1686

CITY OF YONKERS, *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONERS

1a. In its petition, the City argued that the courts below erred in holding it liable for segregated schools on the basis that its housing practices had foreseeable effects on the schools and that the mayor exercised his appointment power to place members on the School Board who were opposed to busing. In its Opposition, the United States does not deny that the issue presented is a substantial one that warrants review by this Court. Instead, the government argues (Opp. 13) that the City's liability was based upon other findings. The government is simply wrong.

The United States' discussion of the issue mentions *evidence*, but it does *not* cite any *findings* of the district court. This is because there are no such findings. Find-

ings of housing practices that had foreseeable segregative effects on schools coupled with mayoral appointments were all the district court relied upon to hold the City jointly liable with the School Board for the segregated conditions of the schools in Yonkers.

Moreover, the three pieces of evidence cited by the United States would not have supported a finding of liability against the City in any event. First, the government cites (Opp. 14) testimony by one councilmember that other members were "concerned" about the racial composition of schools when making housing site selection decisions. But no one during the entire 90 days of trial ever testified that even one councilmember ever took any action "because of" its likely effect, if any, on the racial makeup of schools surrounding the housing site. Thus, the government's heavy reliance on this evidence is flatly inconsistent with this Court's holding in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979), that the intent requirement in the Fourteenth Amendment can be satisfied only by proof that action was taken "because of" its racial impact and not in spite of it. Awareness of consequences, which is all that the testimony arguably shows, simply is not enough.

Second, the government identifies (Opp. 14) instances where individual City officials sought to influence Board decisions. What the United States ignores is that the district court found that these individual efforts had no segregative effect on the schools because the Board, acting independently, ignored the efforts. Pet. App. 613. Moreover, there is no basis for attributing these isolated individual actions to the City itself.

Finally, the government relies heavily (Opp. 14-15 & n.14) upon circumstances surrounding the construction of School 10 as the only direct evidence of City action that could possibly have affected the racial composition of the schools. But that example proves the City's point

that liability was imposed for actions that were never intended to have any segregative effects on the schools. In its description of the School 10 episode, the United States fails to mention that the City's actions, which may have impaired School 10's success as an educational resource, were made at the request of the private developer of low income housing surrounding School 10 and that the City acted for reasons that had *nothing* to do with race. The district court's decision reveals plainly that the City had no intention to affect adversely the racial composition of School 10.[1] Thus, to the extent School 10 is supposed to demonstrate a proper basis for holding the City liable, the argument is plainly inconsistent with *Feeney* on the issue of intent.

In sum, there is no reason to ignore the plain holding below concerning what showing is required to convert housing discrimination into school discrimination. Implicitly, the government recognizes the importance of that fundamental issue. Accordingly, the Court should grant the petition and resolve the question presented.

1b. In its petition, the City argued that the district court's use of the mayor's appointments to the School Board as proof of the City's effort to segregate the schools was inconsistent with this Court's decision in *Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 (1974). The City reasoned that the logic of *Mayor*, which forbids "judicial oversight of discretionary appointments," applied equally to this case. Certainly, the imposition of liability based on these appointments "may interfere with the ability of an elected official to respond to the mandate of his constituency." *Id.*

---

[1] Even if the City had intended to make School 10 a predominantly minority school, that evidence would still not justify holding a City liable for systemwide segregation. Thus, School 10 clearly could not have supported the liability imposed and, in fact, the district court did not rely upon this episode in holding the City liable for intentional segregation of schools throughout Yonkers.

The United States responds simply by arguing (Opp. 16) that *Mayor* should not be applied to this case. But that does no more than beg the question presented. Moreover, the sole authority cited for that proposition is the court of appeals' opinion *in this case*. Obviously, that court disagreed with the City's contention, but that is hardly a basis for arguing that the court of appeals' interpretation does not warrant review. The point is that the court below failed to recognize that the federalism concerns that are at the core of *Mayor* apply directly to this case and therefore review of the mayoral appointment issue by this Court is appropriate.

2. In its petition, the City argued that the court of appeals erred in holding that the district court properly ordered the City to pay whatever the Board requested, unless the City could demonstrate that the expenditures would be duplicative or unnecessary. The City contended that, for sums of money in excess of the minimum amount required to desegregate the schools by busing, the School Board had the burden to show that the expenditure was necessary and reasonably related to the goal of desegregation. The City explained that the holding below placing the burden on the City was squarely in conflict with the Eighth Circuit's decision in *Liddell* v. *State of Missouri*, 731 F.2d 1294, *cert. denied*, 469 U.S. 816 (1984).

There is little question that the United States agrees with the basic principle advanced by the City. It makes *no* effort to dispute the City's legal analysis and it has presented similar arguments to this Court previously. Brief for the United States at 19-35, *Leggett* v. *Liddell*, 469 U.S. 816 (Nos. 83-1386, 1721, 1838). Nevertheless, the government seeks to skirt the issue here by claiming that the issue "is not presented by the record." Opp. 16 n.15. The government is incorrect.

First, the position taken in its Opposition is at odds with its argument in the Second Circuit on appeal of the

district court order to fund two new schools. See Opp. 16 n.15. The United States argued in its brief in that court that all issues relating to school funding were presented and decided in this case and that therefore the subsequent order to pay for the construction of new schools must be upheld as the law of the case. Brief for the United States as Appellee at 21-29, *United States* v. *Yonkers Board of Education & City of Yonkers*, No. 87-6070, 6078 (2d Cir. filed May 9, 1988). Here, the United States argues that the funding issue is not presented.[2] By so arguing, the United States is seeking to avoid review of the funding issues in all courts; a ploy which should not be permitted to succeed.

In fact, the issue is plainly preserved in this case. To be sure, the City did not oppose the voluntary school plan. It preferred that solution to busing. In addition, the City did not object to specific elements of the magnet plan. Instead, it objected generally to any order requiring it to pay in excess of a set budget. Moreover, the City argued pointedly before the district court that "[t]he record evidence . . . does not support a finding that any specific relief against the City in the area of budget [for the school board] . . . is necessary or appropriate." Memorandum of Law of the City of Yonkers in Support of Proposed School Remedial Order at 3, quoted in Reply Brief of Defendants-Appellants at 24, *United States* v. *Yonkers Board of Education and City of Yonkers*, No. 86-6136 (2d Cir.). That contention was rejected by the courts below on the theory that it was the City's burden to prove lack of necessity. It is that holding that is pre-

[2] The United States is wrong on both arguments. For the reasons stated herein, the funding issue presented in the petition is properly before this Court. In addition, the order requiring two new schools to be paid for was ultimately approved by the district court after supplemental proceedings and an expanded evidentiary submission by the City. Thus, the disposition of the general issues in the Second Circuit in this case could not and did not resolve the issues concerning the two new schools.

sented by the record in this case and that should be reviewed by this Court.[3]

3. Finally, the City's petition raised the basic issue of whether community opposition to public housing that was partially race-based could serve as the basis for holding the City liable when its policymakers responded to that opposition. The Second Circuit held that "significant" racial opposition among constituents was sufficient. The United States describes that as a "straightforward" application of this Court's precedents, but declines to cite any of them. In fact, the issue is a significant one that has never been considered by this Court. The district court found that the Yonkers officials involved "were *entirely* well meaning public servants acting in accordance with their perception of what was feasible in the political and socio-economic circumstances of Yonkers and *in the best interests of the community.*" Pet. App. 135 (emphasis added). Given the absence of racial animus by the public officials, this case directly raises the issue of how private racial animus can be converted into state action under the Fourteenth Amendment in the complex and sensitive area of selecting sites for low income housing. That issue is a profound one that will significantly

---

[3] The United States observes (Opp. 16 n.15) that one of the funding disputes was resolved by consent between the City and the Board. It is not apparent what relevance the government ascribes to this point. The agreement was only reached *after* the district court made it clear that the City bore the burden to prove that the money requested was unnecessary. Moreover, the City paid over three million dollars more than it believed was appropriate because of that ruling. The issue plainly is not moot and there is no other reason why the Court should not address the question presented.

The controlling issue of law is whether the burden rests with the Board or the City. The United States does not and could not assert that that issue is not worthy of certiorari. And it is clearly raised by this case; but for the district court's legal error on this issue, the City would never have entered into the negotiations which resulted in the City's paying an extra three million dollars which the Board has never shown to be necessary or reasonable.

affect municipal efforts to provide low income housing during the next decade. Accordingly, it is critical that the Court provide guidance now on the constitutional issue presented in the petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY R. STRAUSS
MICHAEL W. SCULNICK
VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
One Dag Hammarskjold Plaza
New York, New York 10017
(212) 223-1880

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

PAUL W. PICKELLE
JOSEPH E. ST. ONGE
Corporation Counsel
City of Yonkers
Yonkers City Hall
Yonkers, New York 10701
(914) 964-3205

Counsel for Petitioners

May 27, 1988

* Counsel of Record